

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRENT BAILEY,

Defendant.

4:12-CR-3034

MEMORANDUM AND ORDER

This matter is before the Court on several motions filed by the defendant, Brent Bailey. Bailey's motions will be denied.

First, Bailey has filed a "Motion to Correct Clerical Error" ([filing 177](#)), reiterating his assertion that there is a clerical error in the judgment. He has made that claim before. [Filing 155](#); [filing 172](#). And the Court has rejected his claim before. [Filing 158](#); [filing 173](#). The Court will reject his claim again, for the same reason: there is no error. See [filing 158](#) (citing *United States v. Thompson*, 560 F.3d 745, 748 (8th Cir. 2009)).

Bailey has also filed an "Application for Certificate of Appealability" ([filing 180](#)), seeking "a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b)." As support for his application, he reasserts several well-worn claims of factual innocence and violation of his constitutional rights, most of which have been rejected by the Court before in one way or another. See [filing 56](#); [filing 63](#); [filing 120](#); [filing 158](#). But the primary problem is that there is no judgment from which an appeal can be certified by the Court. A certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is only required, as relevant here, for an appeal of the Court's denial of a 28 U.S.C. § 2255 motion. See *Nelson v.*

United States, 297 F. App'x 563, 566 (8th Cir. 2008). The only § 2255 motion of Bailey's that the Court has disposed of was filed and denied in 2013. See [filing 50](#); [filing 53](#); [filing 55](#); [filing 56](#). Bailey did not file a timely notice of appeal from that ruling. But he did file an *untimely* notice of appeal ([filing 58](#)), and the Eighth Circuit dismissed his appeal as untimely. [Filing 91](#). The Court is not going to certify another appeal from a nearly-4-year-old ruling that was already appealed once to no avail, nor is a certificate of appealability appropriate for anything the Court has done since then.

Next, Bailey has filed a "Motion for Appointment of Counsel" ([filing 179](#)), invoking the Sixth and Eighth Amendments to the Constitution, and the Criminal Justice Act, [18 U.S.C. § 3006A](#). But the Sixth Amendment right to counsel does not extend beyond the first appeal of a criminal conviction. *Coleman v. Thompson*, 501 U.S. 722, 756 (1991). And the Eighth Amendment confers no such right at all. See *Murray v. Giarattano*, 492 U.S. 1, 10 (1989). So, whether to appoint counsel is committed to the Court's discretion. See *United States v. Harris*, 568 F.3d 666, 668-69 (8th Cir. 2009). Bailey has no pending motion warranting appointment of counsel under the Criminal Justice Act. See [18 U.S.C. § 3006A\(a\)\(2\)\(B\)](#). Nor can the Court discern any non-frivolous basis in the record for such a motion. So, the Court will deny Bailey's motion for appointment of counsel.

Finally, Bailey has filed a "Motion for En Banc Evidentiary Hearing" ([filing 178](#)), asking for a hearing on all the motions he filed. But none of his motions present a factual issue requiring an evidentiary hearing of any kind.

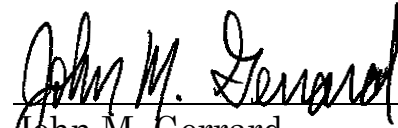
IT IS ORDERED:

1. Bailey's "Motion to Correct Clerical Error" ([filing 177](#)) is denied.

2. Bailey's "Motion for En Banc Evidentiary Hearing" ([filing 178](#)) is denied.
3. Bailey's "Motion for Appointment of Counsel" ([filing 179](#)) is denied.
4. Bailey's "Application for Certificate of Appealability" ([filing 180](#)) is denied.

Dated this 18th day of October, 2017.

BY THE COURT:



John M. Gerrard
United States District Judge